Supreme Court, U. S.
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In The
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-166

RICHARD JOYCE SMITH, TRUSTEE
OF THE PROPERTY OF THE
NEW YORK, NEW HAVEN AND HARTFORD
RAILROAD COMPANY,
DEBTOR,

CROSS-APPELLANT,

v.

UNITED STATES OF AMERICA, *et al.*,

CROSS-APPELLEES.

ON CROSS-APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JURISDICTIONAL STATEMENT OF CROSS-APPELLANT

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JURISDICTIONAL STATEMENT OF CROSS-APPELLANT

This jurisdictional statement is submitted on behalf of cross-appellant, Richard Joyce Smith, Trustee of the property of The New York, New Haven and Hartford Railroad Company, Debtor (the "New Haven Trustee" and the "New Haven," respectively). Since July, 1961, the New Haven has been in reorganization under §77 of the Bankruptcy Act, 11 U.S.C. §205, before the

United States District Court for the District of Connecticut (Circuit Judge Robert P. Anderson sitting by designation). On December 31, 1968, the New Haven Trustee (together with his then co-Trustee) conveyed substantially all of New Haven's assets to Penn Central Transportation Company ("Penn Central") in exchange for a then-to-be judicially determined consideration comprised of cash, mortgage bonds and shares of common stock of Penn Central. See *New Haven Inclusion Case.*, 399 U.S. 392 (1970). The New Haven Trustee's standing in this case is predicated on ownership of $34,025,800 of defaulted mortgage bonds of Penn Central (Stip. Fact ¶¶1 and 2), which has been in reorganization under §77 of the Bankruptcy Act since June 21, 1970, and is also based on his claimed equitable lien, temporarily protected by Order No. 546 of the Penn Central Reorganization Court (Stip. Fact ¶3) to secure the total unpaid portion ($123,809,404) of the purchase price ($174,635,899) approved in *New Haven Inclusion Cases, supra.* In terms of standing, the New Haven Trustee must be deemed to have the rights of a secured creditor to the full extent of his claim, based on the "underwriting" imposed by the New Haven Reorganization Court as to the value of $87.50 per share relative to the 956,000 shares of Penn Central Company[1] common stock which he holds pending adjudication of the New Haven's plan of reorganization, based on this Court's remand, 399 U.S. at 488-89.

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[1]Penn Central Company is the holding company which owns 100% of the stock of Penn Central. The 956,000 shares held by the New Haven Trustee pending final adjudication of New Haven's plan of reorganization represent 4% of the outstanding shares.

THE OPINION BELOW

The New Haven Trustee cross-appeals from so much of an Order, dated June 25, 1974, of a three-judge court convened pursuant to 28 U.S.C. §§2282 and 2284 in the United States District Court for the Eastern District of Pennsylvania (the "court below") as denied the relief sought by cross-appellant.

The Opinion of the court below pursuant to which the Order was entered has not yet been officially reported. Copies of the Opinion and Order are separately bound in the Joint Appendix hereto, at pp. 9-83.[2]

JURISDICTION

This action was brought pursuant to 28 U.S.C. §§1331, 1337, 1651, 2282, 2284 and 2321-2325, to enjoin enforcement of various provisions of the Regional Rail Reorganization Act of 1973, Public Law 93-236, 87 Stat. 985, 45 U.S.C. §§701 *et seq.* (the "RRRA") for repugnance to the Constitution of the United States. In addition, declaratory relief was sought pursuant to 28 U.S.C. §§2201-02.

The principal appellants from the decision of the court below are the United States of America, United States Railway Association ("USRA"), Claude S. Brinegar, Secretary of the United States Department of Transportation and the Interstate Commerce Commission ("ICC") (herein collectively referred to as the "governmental appellants") and Robert W. Blanchette, Richard C. Bond, and John H. McArthur[3], Trustees

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[2]References to documents contained in the Joint Appendix will be identified by the letters "JA" followed by the appropriate page numbers.

[3]Subsequent to commencement of the action, George P. Baker, an original Trustee of Penn Central, resigned and John H. McArthur was appointed in his stead.

of Penn Central, intervening defendants pursuant to Rule 24, Fed. R. Civ. P. (the "Penn Central Trustees").[4]

Since the Order of the court below enjoined certain of the governmental appellants from enforcing certain provisions of the RRRA on grounds of repugnance to the United States Constitution, the governmental appellants and the Penn Central Trustees each have a statutory right of direct appeal to this Court under 28 U.S.C. §1252 and also under 28 U.S.C. §1253.

The New Haven Trustee, as a "party who has received notice of appeal under this section" within the meaning of the penultimate sentence of 28 U.S.C. §1252, is directed by statute to "take any subsequent appeal or cross-appeal to the Supreme Court." 28 U.S.C. §1252.

The New Haven Trustee's notice of appeal was filed with the Clerk of the United States District Court for the Eastern District of Pennsylvania on July 3, 1974, and a copy thereof is printed at JA 385.

The governmental appellants and the Penn Central Trustees support the constitutionality of the RRRA, and therefore are the cross-appellees here. It is understood that the cross-appellees do not challange the jurisdiction of the Court to hear this cross-appeal.

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[4]The governmental appellants filed notices of appeal on July 17, 1974 (USRA), July 22, 1974 (United States), and July 24, 1974 (Brinegar) in *Smith v. United States* (JA 386-88). Defendants Stafford (Chairman of the ICC), Schultz (formerly Secretary of the Treasury) and the ICC, named as party defendants in the *Connecticut General* and/or *Penn Central Co.* cases, filed notices of appeal on July 24, 1974 (JA 389-90). The Penn Central Trustees' notice of appeal was filed on July 1, 1974 (JA 384). The New Haven Trustee's notice of appeal was filed on July 3, 1974 (JA 385).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following provisions of the United States Constitution and Statutes are believed to be involved in the determination of this case:

United States Constitution:

Article I, Section 8, Clauses 3 and 4
Article I, Section 9, Clause 7
Fifth Amendment

Statutes:

Section 77 of the Bankruptcy Act, 11 U.S.C. §205

Regional Rail Reorganization Act of 1973, Public Law 93-239, 87 Stat. 985, 45 U.S.C. §§701 *et seq.*

Extracts of the pertinent constitutional and statutory provisions will be set forth as an Appendix to the New Haven Trustee's Brief. The complete text of the RRRA is printed at JA 391 *et seq.*

QUESTIONS PRESENTED

1. Was the court below in error in refusing to adjudicate whether or not the compulsory conveyance provisions of the RRRA are void on their face as repugnant to the constitutional rights of the New Haven Trustee and other claimants to the Penn Central estate?

2. Did the New Haven Trustee have standing to assert that the enforcement of the compulsory conveyance provisions of the RRRA, if not enjoined, would cause irreparable injury to the New Haven estate?

3. Where a railroad in reorganization under §77 of the Bankruptcy Act is unable to achieve an earnings-based reorganization by reason of large deficits in net railway operating income and the lack of any prospect of earnings, can Congress by enactment deprive claimants to the railroad's estate of their right to insist upon termination of rail operations and the sale of rail properties subject to their mortgage liens for their "highest and best use" value?

4. Considered as an exercise of Congress' Commerce Clause and eminent domain powers, do the compulsory conveyance provisions of the RRRA involve an intentional uncompensated taking, or a taking not compensated in money or its perfect equivalent, of the property of Penn Central, and of claimants to its estate, in violation of the Fifth Amendment to the Constitution?

5. Considered as an exercise of Congress' Bankruptcy Clause powers, do the compulsory conveyance provisions of the RRRA, offend substantive due process rights of claimants to the Penn Central estate by divesting such claimants' liens on valuable rail transportation properties in exchange for common stock and other securities of uncertain value of a governmentally-controlled corporation and an illusory deficiency judgment against such corporation?

6. Do the compulsory provisions of §§303(b)(1) and (2) of the RRRA, requiring conveyance of rail properties and divestment of the liens of claimants to the Penn Central estate, in advance of judicial determinations as to "highest and best use" value of such properties and the equitable equivalent value of the securities and common stock to be exchanged therefor, offend the procedural due process rights of claimants to the Penn Central estate?

7. Are the compulsory conveyance provisions of §§206, 207, 208, 209, 303 and 304 of the RRRA void as a law, purportedly on the subject of bankruptcies, which is not uniform geographically throughout the United States?

STATEMENT OF THE CASE

On January 2, 1974, the RRRA was signed into law by the President.[5] On January 25, 1974, the New Haven Trustee filed a complaint asserting that the RRRA was unconstitutional on its face and as applied to Penn Central, naming as defendants the United States, USRA, and Secretary of Transportation Brinegar. The action was filed in the United States District Court for the District of Columbia. On the same day, other creditors of Penn Central filed a similar complaint in the United States District Court for the Eastern District of Pennsylvania *(Connecticut General v. USRA*, Civil Action No. 74-189). In order to achieve a single expedited proceeding, the New Haven Trustee consented to a motion of the United States and other governmental defendants to transfer *Smith v. United States, et al.* to the Eastern District of Pennsylvania pursuant to 28 U.S.C. §1404(a). A third case, *Penn Central Co. v. Brinegar*, was also transferred, pursuant to §1404(a), from the District of Columbia.

Pursuant to 28 U.S.C. §§2282 and 2284, a three-judge district court, consisting of Circuit Judge Ruggero J. Aldisert and District Judges John P. Fullam and Louis C. Bechtle, was constituted to hear all the cases concerning the constitutionality of the RRRA.

The Penn Central Trustees, who intervened as defendants, answered that the RRRA was constitutional

[5]Public Law 93-236, codified as 45 U.S.C. §§701 *et seq.* Section references are to the Section numbers in Public Law 93-236, and not to the codification in 45 U.S.C.

on the assumption of a "Tucker Act remedy" under 28 U.S.C. §1491 to "underwrite" any constitutional deficiency in the RRRA.

After joinder of issue, the New Haven Trustee on April 29, 1974 filed a motion for summary judgment as to certain of the legal issues raised by his complaint.[6] The United States and the other governmental defendants, and the Penn Central Trustees, each then filed counter-motions for summary judgment. The factual record was then completed by a Stipulation as to the Record in the Penn Central Reorganization Proceedings, a Stipulation as to Factual Matters, a Joint Documentary Submission, and affidavits of two government witnesses.[7] *Smith v. United States* was then consolidated for purposes of oral argument and disposition on the merits with the *Connecticut General* and *Penn Central Company* cases, in which motions for summary judgment had also been filed.

The issue before the court below was whether an injunction should issue restraining the enforcement of various sections of the RRRA on grounds of repugnance to the Constitution. The court below granted, in part, the motion of the New Haven Trustee for summary judgment, and issued an order dated June 25, 1974 ("Order") (JA 82-83) which enjoined defendant USRA from certifying a final system plan to the Special Court pursuant to §209(c) of the RRRA, and enjoined all defendants from taking any

[6]See New Haven Trustee's Memorandum of Points and Authorities in Support of Motion for Summary Judgment (E.D. Pa. C.A. No. 74-1107, Doc. No. 4, May 2, 1974; JA 258), pp. 1-8 for listing of issues included in the Motion for Summary Judgment.

[7]Ten copies of the Joint Documentary Submission have been filed with the Clerk of this Court. One of the government's affidavits is Doc. No. 61 in the Joint Documentary Submission; the other is reprinted at JA 226-55. The Stipulation as to Factual Matters is printed at JA 317-24. The Stipulation as to the Record is identical to that set forth at JA 197-99.

action to enforce the provisions of §304(f) of the RRRA with respect to any abandonment, cessation or reduction of railroad service which may hereafter be determined by a court of competent jurisdiction to be necessary for the preservation of rights guaranteed by the Constitution (Order, ¶¶1, 2; JA 82). In addition, the court below enjoined all parties "from enforcing or taking any action to implement so much of Section 207(b) of the RRRA as purports to require dismissal of pending proceedings for reorganization [of Penn Central] under Section 77 of the Bankruptcy Act" (Order, ¶3; JA 82).[8] Finally, the court below entered a declaratory judgment that §303 of the RRRA is null and void insofar as it fails to provide compensation for interim erosion pending final implementation of the final system plan contemplated by the RRRA and that §304(f) of the RRRA is null and void as violative of the Fifth Amendment of the Constitution to the extent it would require continued operation of rail services at a loss in violation of the constitutional rights of the owners and creditors of Penn Central (Order, ¶¶4a, 4b; JA 82). The court below also declared a portion of the third sentence of §207(b) of the RRRA to be null and void as violative of Article I, Section 8, Clause 4 of the Constitution in that the RRRA is not uniform geographically throughout the United States and, to the extent that the RRRA amends §77 of the Bankruptcy Act, it is a law on the subject of bankruptcies within the meaning of Article I, Section 8, Clause 4 (Order, ¶4c; JA 83).

The court below was not unanimous in every respect. Circuit Judge Aldisert, who wrote the Opinion of the Court, was joined by District Judge Bechtle in

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[8]This portion of the order was entered *sua sponte* as none of the plaintiffs sought this relief.

disposing of "plaintiffs' threshold contention that the possible future conveyance of rail properties to Conrail [Consolidated Rail Corporation] in consideration for Conrail stock and securities constitutes a Fifth Amendment taking without payment of just compensation" (Opinion of the Court; JA 23) by concluding that "we do not meet these Fifth Amendment questions because we are persuaded that these issues are premature" (Opinion of the Court; JA 23). Judge Fullam concurred in the result, but took the view that certain of the constitutional issues presented were ripe for adjudication and should not have been deferred (Concurring opinion of Fullam, J., Part I; JA 55-60). The New Haven Trustee as cross-appellant asserts that the court below was in error in finding that the issue of the facial constitutionality of the compulsory conveyance provisions of the RRRA was not required to be adjudicated on account of alleged prematurity and lack of ripeness.

The court below was also in disagreement as to whether the RRRA was, to the extent it represents a "law on the subject of bankruptcies," void for want of geographical uniformity under Art. I, Sec. 8, Cl. 4 of the Constitution. Judges Fullam and Bechtle so held, but concluded that the only provision in the RRRA that could not be rationalized as being based on Commerce Clause powers was the provision requiring mandatory dismissal of §77 proceedings,[9] which they held to be void for lack of geographical uniformity (Concurring opinion of Fullam, J., Part II; JA 61-65). Judge Aldisert dissented from this conclusion on the ground that the RRRA is uniform in its application to creditors, and that creditor parties lack standing to assert the consitutional defect of the RRRA's non-appli-

[9]RRRA, §207(b), third sentence, Clause (2).

cability to a debtor railroad located outside the region (JA 26-29). The New Haven Trustee, on this appeal, asserts that the RRRA is void for want of geographical uniformity in a number of respects, including (but not limited to) Clause (2) of the third sentence of §207(b), and that, for the reasons set forth in Part II of Judge Fullam's concurring opinion (for the majority of the court), the New Haven Trustee has standing to assert this constitutional defect.

SUBSTANTIALITY OF QUESTIONS PRESENTED

This cross-appeal challenges the constitutional validity of the compulsory conveyance provisions of the RRRA, an issue which the majority of the court below refused to reach on grounds of alleged prematurity. While the RRRA was declared unconstitutional in part by the court below, and the court below enjoined certification of any "final system plan" by USRA to the Special Court, this judgment was based solely on the constitutional defect that the RRRA requires Penn Central to sustain enormous operating deficits, and consequent erosion of the estate available to satisfy Penn Central claimants, during the period January 2, 1974 to the date when the compulsory conveyances mandated by the RRRA may occur, without making provision for payment to the Penn Central estate of just compensation in respect of these operating deficits and consequent erosion. While the decision of the Court below provides an obstacle to the implementation of an unconstitutional taking, the issues which the court below found to be ripe for adjudication represent, in effect, but the tip of the iceberg. The issues which it treated as "premature," which went to the constitutional defects, both facial and as applied to Penn Central, of the compulsory con-

veyance provisions of the RRRA, are inherently important issues which require concurrent resolution. If this Court merely sustains the judgment below without addressing the constitutionality of the compulsory conveyance provisions of the RRRA, a correction by Congress of only the constitutional defects in the RRRA found by the court below, without remedying the more basic constitutional defect asserted in this cross-appeal, would produce seriously adverse consequences to both the Penn Central creditors and the public interest. This cross-appellant under such circumstances would be required to commence still another action to declare such an amended RRRA unconstitutional on the grounds which are urged on this cross-appeal, thereby resulting in still another round of appeals to this Court from either the grant or denial of an injunction in a subsequent §2282 action attacking the RRRA. Broad public and private considerations, as well as objectives of judicial economy, thus favor the adjudication of this cross-appeal at this time.

CONCLUSION

This Court has jurisdiction of this cross-appeal, and substantial questions are presented requiring plenary consideration. If the Court notes probable jurisdiction of the related appeals by the governmental appellants and the Penn Central Trustees, it should similarly note probable jurisdiction of this cross-appeal.

Respectfully submitted,

August 23, 1974

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